Supreme Court, U.S.
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No. 01-1021

In The

Supreme Court of the United States

SILVER SPUR RESERVE,
dba SILVER SPUR MANOR,

Petitioner,

v.

THE CITY OF PALM DESERT and
THE PALM DESERT RENT REVIEW BOARD,

Respondents,

THE TENANTS RESIDING AT
SILVER SPUR MOBILE MANOR,

Real Parties in Interest.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of California**

APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

(Filed Nov. 29, 2001)

SILVER SPUR MOBILE MANOR, a California General Partnership, dba Silver Spur Manor, Petitioner, v. CITY OF PALM DESERT, et al, Respondents, The Tenants Residing at Silver Spur Mobilehome Park, George Gutierrez, Catherine Britt, et al, Real Parties in Interest	CASE NO. 80790 NOTICE RE BRIEFING SCHEDULE AND HEARING ON SILVER SPUR'S CLAIM FOR ADMINISTRATIVE AND ATTORNEYS FEES Status Conference: November 26, 2001 Time: 8:30 a.m. Dept: 2J Judge: Lawrence W. Fry Petitioner's Claim and Opening Brief Due: December 26, 2001 Opposition Brief(s) Due: January 25, 2002 Silver Spur's Reply Brief Due: February 8, 2002 Hearing Date on Silver Spur's Claim for Administrative and Attorneys Fees: February 15, 2002

PLEASE TAKE NOTICE that the Status Conference set by the Court came on regularly for hearing on

November 26, 2001 at 8:30 a.m. in Department 2J before the Honorable Judge Lawrence Fry. Scott Harlow appeared on behalf of the Tenants of Silver Spur Reserve. Douglas S. Phillips of Best, Best & Krieger appeared on behalf of the City of Palm Desert and the Palm Desert Rent Review Board. No appearance was made by Silver Spur Reserve.

The Court, having received the Remittitur, and having considered the unpublished opinion filed June 26, 2001, ordered that Silver Spur shall file and serve its claim and opening brief for administrative and attorneys fees under *Galland v. City of Clovis*, (2001) 24 Cal.4th 1003. The City of Palm Desert and its Rent Review Board shall, and the Tenants Residing at Silver Spur may, file and serve their Opposition Brief on or before January 25, 2002. Silver Spur's Reply Brief, if any, shall be filed and served on or before February 8, 2002. The hearing on the administrative and attorneys fees claim shall be held on February 15, 2002 at 8:30 a.m. in Department 2J. The Tenants, through their counsel, may participate at that hearing if they desire. At the hearing, the Court will consider Silver Spur's claim in the light of the administrative record and the *Galland v. City of Clovis* in order to determine whether the attorneys fees incurred by Silver Spur were the result of the actions of the City and its Rent Review Board to deliberately obstruct legitimate rent increases sought by Silver Spur (see: unpublished opinion of the Court of Appeal, 4th District, Division Two, State of California in this case, filed June 26, 2001 at page 31, lines 14-19 and page 32, lines 1-9)

DATED: November 26, 2001

/s/ Douglas S. Phillips
DOUGLAS S. PHILLIPS
Deputy City Attorney,
City of Palm Desert

PROOF OF SERVICE

I, SHIELA LUCK, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 74-760 Highway 111, Suite 200, Indian Wells, California 92210. On November 29, 2001, I served the within documents:

NOTICE RE BRIEFING SCHEDULE AND HEARING ON SILVER SPUR'S CLAIM FOR ADMINISTRATIVE AND ATTORNEYS FEES

[ ] by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Indian Wells, California addressed to the person(s) at the address(es) set forth below.

[ ] by causing personal delivery by of the document(s) listed above to the person(s) at the address(es) set forth below.

[ ] by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

[ ] I caused such envelope to be delivered via overnight delivery addressed as indicated on the attached service list. Such envelope was deposited for delivery by UPS following the firm's ordinary business practices.

Anthony Rodriguez, Esq.,
1300 Clay Street, Suite 600
Oakland, CA 94612

Scott Harlow, Esq.
777 East Tahquitz Canyon Way, Suite 200
Palm Springs, CA 92262

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 29, 2001, at Indian Wells, California.

/s/ Shiela Luck
SHIELA LUCK

BEST BEST & KRIEGER LLP

A CALIFORNIA LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS
LAWYERS

[Names And Addresses Omitted In Printing]

February 12, 2001

Honorable Presiding Justice
and Associate Justices
Court of Appeal, State of California
Fourth District, Division 2
3389 12th Street
Riverside, CA 92501

Re: Silver Spur Reserve v. City of Palm Desert;
Case No. E023514

Dear Justices:

This letter requests that the Court accept this letter brief which brings a new case to this Court's attention. The new authority is *Roger Galland v. City of Clovis*, Docket No. S080670, 2001 Cal. LEXIS 530, a decision by the Supreme Court of California filed February 5, 2001. *Galland* is significant to this case in that respondent contends that Silver Spur is not entitled to an attorneys' fees award under 42 USC § 1988 on the grounds that this case was neither pled nor tried as a 42 U.S.C. § 1983 case. *Galland v. Clovis* holds that a mobilehome park owner may not seek 1983 damages based on the City's failure to grant a requested rent increase until after the city has been given an opportunity to attempt to formulate an adequate future rent adjustment and has failed to do so. The *Galland* court held that a Section 1983 damages claim could not be brought until a court determined that such a

future rent adjustment is inadequate. In the present case, Silver Spur's Rent Increase Application was not remanded to the City to attempt to formulate an adequate future rent adjustment. Thus, in the present case, a damages remedy under 42 USC § 1983 and an attorneys' fees award under 42 USC § 1988 is foreclosed because the City has not been given an opportunity to attempt to formulate an adequate future rent adjustment.

This authority was filed on February 5, 2001, and could not be included in the City's Reply Brief filed July 7, 2000.

Respectfully submitted,

/s/ Douglas S. Phillips
Douglas S. Phillips
of BEST BEST & KRIEGER LLP

DSP:slz
cc: Kurt Delsack, Esq.
Scott N. Harlow, Esq.
Anthony C. Rodriguez, Esq.
Honorable Lawrence W. Fry, Riverside County Superior Court
California Supreme Court
David J. Erwin, City Attorney, City of Palm Desert
Sheila Gilligan, City Clerk, City of Palm Desert
Jim Ferguson, Mayor, City of Palm Desert

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Best Best & Krieger LLP, P.O. Box 13650, Palm Desert, CA 92255, 74-760 Highway 111, Suite

200, Indian Wells, CA 92210. On February 14, 2001, I served: **City of Palm Desert's Letter Brief Dated 2/12/01**

[ ] by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

[x] by placing a copy of the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palm Desert, California by First Class Mail addressed as set forth below.

[ ] by causing personal delivery the document(s) listed above to the person(s) at the address(es) set forth below.

[ ] by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

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LAW OFFICE OF
ANTHONY C.
RODRIGUEZ
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Oakland, CA 94612

The Honorable
Lawrence W. Fry
c/o Clerk of the Court
(One Copy)
Riverside Superior Court
46-200 Oasis Street
Indio, CA 92201
Trial Judge

Honorable Presiding
Justice and Associate
Justices
Court of Appeal,
State of California
Fourth District, Division 2
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Court *(5 Copies)*
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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on February 14, 2001, Indian Wells, California.

/s/ Karen Ciccarelli
Karen Ciccarelli

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

SILVER SPUR RESERVE, Plaintiff and Appellant, v. THE CITY OF PALM DESERT, et al., Defendants and Respondents, THE TENANTS RESIDING AT SILVER SPUR MOBILEHOME PARK, et al., Real Parties in Interest and Appellants.	CASE NO. E023514MF (Consolidated with E024376) Riverside County Superior Court Case No. 80790 (Filed Jul. 7, 2000)
SILVER SPUR RESERVE, Plaintiff and Respondent, v. THE CITY OF PALM DESERT, Defendant and Appellant, GEORGE GUTIERREZ, et al., Real Parties in Interest and Respondents.	

APPEAL FROM THE SUPERIOR COURT
OF RIVERSIDE COUNTY
HONORABLE LAWRENCE FRY, JUDGE PRESIDING

APPELLANT AND RESPONDENT CITY OF PALM DESERT'S COMBINED RESPONDENT'S AND APPELLANT'S REPLY BRIEF

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I.

INTRODUCTION

The City of Palm Desert files its Respondent's Brief respecting Silver Spur's Appeal. Further, the City also files its Appellant's Reply Brief in support of the Appeal filed by the City of Palm Desert to the trial court's award of attorneys' fees under 42 USC § 1988.

II.

RESPONDENT'S BRIEF OF THE CITY OF PALM DESERT

A. Contempt Issue.

On October 30, 1997, petitioner ("Silver Spur") filed a Notice of Motion and Motion Requesting Order to Show Cause Re: Contempt by the City of Palm Desert (CT, pp. 273-285). Silver Spur's counsel filed a Declaration in support of the Motion (CT, pp. 286-666). The City of Palm Desert filed Points and Authorities in Opposition to the Motion for Order to Show Cause Re: Contempt (CT, p. 687-696). Silver Spur filed a Reply Brief in support of its

Motion Requesting Order to Show Cause Re: Contempt by the City of Palm Desert (CT, pp. 708-712).

Silver Spur scheduled the Order to Show Cause Re: Contempt for the same day as the hearing on its underlying Petition for Writ of Administrative Mandate: initially November 14, 1997. (See, Petitioner's Notice of Motion and Motion for Writ of Administrative Mandamus, CT, p. 203, and Petitioner's Notice of Motion and Motion Requesting Order to Show Cause Re: Contempt, CT, p. 273.)

Silver Spur's Contempt Motion and the hearing on Silver Spur's Petition for Writ of Mandate came on for hearing before Judge Fry on January 23, 1998. (See, Reporter's Transcript of Proceedings, Friday, January 23, 1998.) At the January 23, 1998 hearing, counsel for Silver Spur stated that he had no experience with contempts. Counsel stated his understanding that once a declaration in support of the contempt was filed it was then up to the court to prosecute the contempt. (RT, 1/23/98, p. 4, lns. 15-22.) The trial court explained that it would not prosecute the contempt and that it was Silver Spur's burden to prove the existence of an order, notice of the order and willful non-compliance, beyond a reasonable doubt. (RT, 1/23/98, p. 6, lns. 20-28; p. 7, lns. 1-5.) Silver Spur's attorney advised that this was the first time he had been involved in this type of proceeding and that his understanding was that the District Attorney would prosecute the contempt. (RT, 1/23/98, p. 7, lns. 6-9.) The court explained that Silver Spur was bringing the contempt before the court not the District Attorney. (RT, 1/23/98, p. 7, lns. 10-12.)

The following discussion then took place between the court and counsel for Silver Spur:

> "THE COURT: Let me ask you this then: we need to procedurally deal with the contempt issue. What do you want to do with this contempt issue, Mr. Rodriguez?
>
> MR. RODRIGUEZ: Your honor, like I said, I was under the impression that this was something we gave to you as officers of the court, and that you could decide whether or not to press charges against these people with an order to show cause.
>
> THE COURT: I am not the prosecutor.
>
> MR. RODRIGUEZ: But we were under the impression that's what would happen; you would contact the prosecutor, and it would go that way. I know my client doesn't want to – if I have to come down and prosecute this thing, they are not going to want to do that. So I would say if the law is that it is our responsibility to prosecute this, that I don't think we want to do that; *that we would withdraw that*. If it is the D.A.'s responsibility, we would want it to go forward." (RT, 1/23/98 hearing, p. 13, lns. 11-28; p. 14, ln. 1.) (Emphasis added.)

Later in the hearing, the following discussion took place between the court and Mr. Rodriguez:

> "THE COURT: All right Mr. Rodriguez: I don't know of any time – this is a civil contempt which is a quasi-criminal matter. I don't know of any time that the D.A. steps in and takes care of those except in maybe child support matters. Child support matters, they have a particular

> division of their office that will file civil contempts with fathers and mothers that are not paying their child support. So I don't know of any other situation where they come in, because it is a civil matter basically, but it is quasi-criminal as far as procedurally the parties get their rights protected, because theoretically, I could put them in custody. So that's sort of where we are. With that in mind, what do you wish to do with your contempt matter?
>
> MR. RODRIGUEZ: If the ruling is that it would be our burden to somehow prosecute this and collect the evidence and bring the witnesses in here and all of that, *then we would withdraw it.*
>
> THE COURT: All right. Then we will proceed with the writ matter." (RT, 1/23/98, p. 16, lns. 26-28; p. 17, lns. 1-20.) (Emphasis added.)

The trial court was correct that the burden of proof rests with the moving party when a punitive contempt judgment is imposed. *International Union, United Mineworkers of America v. Bagwell* (1994) 512 U.S. 821; *Hicks on Behalf of Feiock v. Feiock* (1988) 485 U.S. 624, at pp. 631-632; *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1256. Furthermore, guilt must be established beyond a reasonable doubt. *Mitchell,* cited above at p. 1256. The elements of contempt are: a valid order, the alleged contemners' knowledge of the order, and non-compliance. If the petitioner proves those elements beyond a reasonable doubt the violation is established. *Moss v. Superior Court* (1998) 17 Cal.4th 396, 428.

When Silver Spur learned that it had the burden of proof to establish the elements of contempt, Silver Spur withdrew the contempt. Silver Spur never prosecuted the

contempt further and the court never found the City attorney, the hearing officer or the Board in contempt. In sum, Silver Spur has waived the issue by voluntarily withdrawing the Motion/OSC Re: Contempt.

The record also reflects that the trial court properly intended to deal with the contempt issue first. (RT, 1/23/98, p. 4, lns. 4-5.) It would have been inappropriate to proceed with Silver Spur's Petition for Writ of Mandate if the very Deputy City Attorney (Douglas Phillips) Silver Spur was seeking to hold in contempt was before the court arguing the opposition to the mandate petition. The trial court has fundamental authority to control the order of proof and the conduct of proceedings before it. Evidence Code § 320; Civil Code § 128 subd. (a)(3). The trial court did not abuse its discretion when it addressed the contempt issue before it addressed the writ of mandate issue given the difficult if not impossible situation into which the City would be placed if the City were required to defend a contempt at the same time that it defended the merits of the Writ Petition.

In summary, the record does not support Silver Spur's contention that the trial court required Silver Spur to conclude the contempt proceedings before the Rent Increase Application could go forward. The Reporter's Transcript of the January 23, 1998 hearing indicates that Silver Spur dropped the contempt when Silver Spur became aware of its obligations to prosecute each of the contempt elements beyond a reasonable doubt. And even if this were not the case and the trial court had required the contempt issue to be concluded first, the court did not abuse its discretion in so doing, given that the City attorney Silver Spur was seeking to hold in contempt was the

same attorney arguing in opposition to the mandate petition.

B. Section 102(C)(1)(a) of the Palm Desert Rent Control Guidelines which Presumes that a Management Fee in Excess of 5% of Gross Income Is Unreasonable, Is Valid.

Silver Spur's argument fails to distinguish between the City of Palm Desert Rent Control Ordinance and the City's Rent Control Guidelines. The 5% management fee cap is not found in the City's Rent Control Ordinance. (Administrative Record, pp. 1-8.) Rather, the Palm Desert Mobilehome Park Rent Review Board Guidelines for Hardship Rent Increases (fair return on property), AR, pp. 9-19 provide that management fees (contracted or owner-performed) of 5% or less of gross income are presumed to be reasonable. Management fees in excess of 5% of gross income are presumed to be unreasonable. This presumption may be rebutted by clear and convincing evidence. (Guidelines, Section 102(C)(1)(a).)

The 5% management fee presumption contained in the Guidelines is valid. Constitutionally valid rent control ordinances (and guidelines) must be reasonably calculated to eliminate excessive rents and provide landlords a just, fair and reasonable return on their property. *Donohue v. Santa Paula West Mobilehome Park* (1996) 47 Cal.App.4th 1168, 1177; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 165. A just, fair and reasonable return is characterized as sufficiently high to encourage and reward efficient management, discourage the flight of capital, maintain adequate services, and enable operators to

maintain and support their credit status. However, the amount of return should not defeat the purpose of rent control to prevent excessive rents. *Oceanside Mobilehome Park Owners Association v. City of Oceanside* (1984) 157 Cal.App.3d 887, 907. Despite this characterization, courts continue to struggle with the meaning of the "just, fair and reasonable return" standard. There is a range of rents which can be charged, all of which could be characterized as allowing a just and reasonable return. *San Marcos Mobilehome Park Owners Association v. City of San Marcos* (1987) 192 Cal.App.3d 1492, 1502. At least one court has deemed the term "fair return" incapable of precise definition. *City of Berkeley v. City of Berkeley Rent Stabilization Board* (1994) 27 Cal.App.4th 951, 984. Under broad constitutional tolerance, California cities may enact various forms of residential rent control measures to satisfy the just, fair and reasonable rent standard. *Tri-County Apartment Association v. City of Mountain View* (1987) 196 Cal.App.3d 1283, 1286. Public administrative bodies, charged with implementing and enforcing rent control measures, are not obliged by either state or federal constitutional requirements to employ any prescribed formula or method to fix rents. *Carson Harbor Village Ltd. v. City of Carson Mobilehome Park Rental Review Board* (1999) 70 Cal.App.4th 281, 289. Mobilehome Rent Control Ordinances (and Guidelines) are accorded particular deference as rational curative measures to counteract the effects of mobilehome space shortages that produce systematically low vacancy rates and rapidly rising rents. *Carson Mobilehome Park Owners Association v. City of Carson* (1983) 35 Cal.3d 184, 189 fn. 4. The selection of an administrative rent ceiling standard "is a task for local

governments . . . and not the courts." *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 681. Further, the actual method utilized to regulate rents is immaterial so long as the result achieved is constitutionally acceptable. *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 370-372. Although whether rent control legislation is reasonable or confiscatory depends ultimately on the result reached, a rent control regulation may be invalid on its face when its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties. *Birkenfeld v. City of Berkeley*, cited above at p. 165. *Carson Mobilehome Park Owners Association v. City of Carson*, cited above at p. 191. Facial validity, in short, is concerned more with excessive restriction than with comprehensiveness of regulation. Undoubtedly, rent control ordinances can be written which are so restrictive as to facially preclude any possibility of a just and reasonable return . . . it is only these or comparably drastic ordinances which can be struck down as facially confiscatory. *Cotati Alliance for Better Housing v. City of Cotati* (1983) 148 Cal.App.3d 280, 291.

Under this deferential standard, the 5% presumption in Palm Desert's Guidelines is valid. The 5% presumption encourages economical management yet avoids a confiscatory result by permitting the park owner to rebut the presumption that a management fee in excess of 5% is unreasonable.

In *Oceanside Mobilehome Park Owners Association v. City of Oceanside* (1984) 157 Cal.App.3d 887, 909, the court upheld a provision in the City's Rent Control Ordinance which permitted a limited portion of owner-performed labor in operating and maintaining a park to be included

as operating expenses. The provision provided a maximum allowance of 5% of the gross income unless such a limitation would be substantially unfair. The provision established a presumption that a park owner must devote substantially all of his or her time (at least 40 hours per week) to performing such managerial or maintenance services to warrant the maximum 5% allowance. The provision declared that no allowance would be authorized unless a park owner documented the hours spent and the nature of the services provided. The trial court held that it was unconstitutional to exclude those expenses chargeable to owner-performed management or labor services in excess of 5%. The Court of Appeal reversed stating that the limitation reasonably related to a legitimate governmental purpose and that the Court would not second guess the wisdom of the limitation. The Court found that there was a rational basis for the provision which safeguarded the integrity of the NOI process by avoiding potential abuse of owner management fees constituting operating expenses.

Palm Desert's 5% limitation safeguards the integrity of its NOI process by avoiding potential abuse of owner/management fees constituting operating expenses. The provision is rational, and is not confiscatory especially where, as here, an owner can rebut the presumption. This Court should not second guess the wisdom of Palm Desert's decision to cap management fees at 5% of gross income unless the owner can rebut the presumption.

C. **The Snowbird Issue.**

When the City of Palm Desert adopted the Rent Control Ordinance 456 (in 1986) CT 70A-83, the City Council made four findings. The City Council found that there is presently within the City of Palm Desert a shortage of spaces for the location of mobilehomes commiserate with the demand therefor. This inequitable market situation, the City found, has resulted in low vacancy rates and contributed to rapidly escalating rents. This situation according to the City, has resulted in serious concern and hardship among a significant portion of Palm Desert residents living in mobilehome parks. The City also found that mobilehome owners are property owners with sizeable investments in their mobilehomes and appurtenances. Palm Desert found that alternative sites for the relocation of mobilehomes are difficult to find due to the shortage of vacant spaces, the restrictions on the age, size or style of mobilehome permitted in many parks and requirements related to the installation of mobilehomes, including the cost of moving a mobilehome. The City found that these facts tend to create a captive market of mobilehome park tenants and a great imbalance in the bargaining position of the park owner and the mobilehome park tenants in favor of the park owners. Finally, the City Council found and declared that it was necessary to protect the residents of mobilehomes from unconscionable changes in rental rates and unreasonable changes in park rules and regulations while simultaneously recognizing and providing for the needs of park owners to receive a just and reasonable return on their property (CT 70A).

Silver Spur argues that if the purpose of the City's Rent Control Ordinance is to provide affordable housing for low income people in the face of a housing shortage, controlling the rents of second homes is irrelevant to that purpose and therefore unconstitutional. (Silver Spur's Brief, p. 34, lns. 5-10.) However, this question again is one of wisdom rather than reasonableness. The City has determined that rent control should apply to all mobilehome spaces within the City and that decision should be upheld unless it is totally irrational. Several reasons support the City. Burdensome space-by-space administration of the Rent Control Ordinance is avoided. Determination of whether a space is a "second home" or not is avoided. Excluding second homeowners from rent control could raise grave equal protection concerns. Finally, the underlying purpose of rent control, to avoid excessive rents, is fostered. Simply because Silver Spur could get more rent without across the board rent control does not invalidate the Ordinance.

The California Supreme Court has never held that rent control schemes involving mobilehome parks should be reviewed under the Agins/Nollan test.[1] Instead, the standard of review must be at least as deferential as for generally applicable zoning laws and other legislative land use controls, i.e., the party challenging rent control must show that it constitutes an arbitrary regulation of property rights. *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 967; *Montclair Park Owners Association v. City of Montclair* (1999) 76 Cal.App.4th 784, 793.

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[1] *Agins v. City of Tiburon* (1980) 447 U.S. 485; *Nollan v. California Coastal Commission* (1987) 483 U.S. 825.

Silver Spur concedes that protection of mobilehome owners from excessive rents is a legitimate governmental interest. Palm Desert may and has reasonably concluded that applying mobilehome rent control to all spaces within the city would accomplish that goal. Thus, Palm Desert's rent control scheme is not on its face an arbitrary regulation of the owner's property rights.

Finally, even if it could be argued that Palm Desert's Ordinance has failed to substantially advance the stated legislative goal of the Ordinance to create more affordable housing in the City of Palm Desert, that reason is insufficient to strike down Palm Desert's Rent Control Ordinance. The California Supreme Court has expressly held that this test cannot be used to review the constitutionality of a general rent control law. *Santa Monica Beach*, cited above at 19 Cal.4th p. 967.

III.

PALM DESERT'S REPLY BRIEF

A. Silver Spur Is Not Entitled to an Attorneys' Fees Award Under 42 USC § 1988.

1. This Case Was Neither Pled Nor Tried as a 1983 Case.

Virtually every alleged legal or procedural error of a local planning authority or zoning board of appeal could be brought to a federal court on the theory that the erroneous application of state law amounted to a taking of property without due process. Neither Congress nor the courts have, to date, indicated that Section 1983

should have such a reach. As the First Circuit Court of Appeals has stated:

> "Plaintiffs would thus have us rule that the due process clause to the United States Constitution was violated when [the town of] Bolton's planning board, for the purpose of protecting what it viewed as the town's basic character openly interpreted state subdivision laws and a state court decision in ways which frustrated plaintiff's large-scale housing development of a particular design. [P] . . . Every appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused or 'distorted' its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give the state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under Section 1983. As has been often stated, '[t]he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution."

Creative Environments, Inc. v. Estabrook (1st Cir. 1982) 680 F.2d 822, 833, 832-833.

In *Kreutzer v. County of San Diego* (1984) 153 Cal.App. 3d 62, 69, the court held that a petition for writ of mandate stated a cause of action under Section 1983 supporting a fee award under Section 1988 even though the caption and the body of the petition did not specify Section 1983. This is because under California and Federal law the labeling of a pleading is not determinative

but rather the subject matter of the action is to be determined from its allegations regardless of what they may be called. Here, not only did Silver spur fail to denominate Section 1983 in any of their pleadings, Silver Spur's conclusory assertions in their pleadings that they were deprived of constitutional rights by Palm Desert's failure to grant them a requested rent increase fails to state a claim under Section 1983. In *Logan v. Southern California Rapid Transit District* (1982) 136 Cal.App.3d 116, 124-125, the court found that conclusory assertions in the complaint failed to state a claim under Section 1983. The court held that plaintiff had failed to assert facts to support the claim that he was deprived of a property right without due process.

In this case, the judgment granting the peremptory Writ of Mandamus filed June 3, 1998 (CT pp. 781-783) simply provides that petitioner is entitled to a discretionary rent increase. The court found that the increase would provide a just and reasonable return on petitioner's investment. Notably, the court denied petitioner's request for leave to amend its petition to state a 1983 claim (CT pp. 722, 726 and 782).

The award of attorneys' fees in this case unfairly surprised the City because the issue was never alleged in the petition, the briefs or the oral argument before the Court.

In *Board of Administration v. Wilson* (1997) 57 Cal.App.4th 967, the court of appeal held that the California Public Employees Retirement System was not entitled to an award of fees under 42 USC § 1988 because the case was neither pled nor tried as a Section 1983 case. The

reviewing court noted that the parties had not requested and the trial court had not made any findings peculiar to the Section 1983 Civil Rights Claim. Until the application for attorneys' fees was made, no aspect of Section 1983 was argued by the parties. (*Wilson* at p. 972.) Under these circumstances, the court concluded that it would be prejudicial to respondents and unfairly surprise them (and the court) to belatedly invoke this one remedial aspect of Section 1983. The court in *City of Hawaiian Gardens v. City of Long Beach* (1998) 61 Cal.App.4th 1100, 1112 agreed with the *Wilson* analysis. In *Hawaiian Gardens* although the plaintiffs pled a cause of action under Section 1983, the case was tried on the mandate theories only. The Court of Appeal found that the trial court did not abuse its discretion in denying the application for fees under 42 USC § 1988. This case was tried as a petition for writ of mandate under CCP § 1094.5. The parties in the court recognized this case was a Section 1094.5 matter when the court denied Silver Spur's Motion to Amend to State a *New* Cause of Action under 42 USC § 1983.

The trial court award of attorneys' fees under 42 USC § 1988 should be reversed.

B. Petitioner Is Not Entitled to an Award of Attorneys' Fees Under Government Code § 800.

Silver Spur first claims that the City denied its application on four separate occasions. Not so. In essence, the City considered Silver Spur's Application for a Rent Increase, denied it and then reconsidered the Application after the trial court's remand. The City once again denied the Petition. Once the court granted part of Silver Spur's

Rent Increase Application, the City promptly approved the increase. (CT, p. 793-796.) Silver Spur argues that the City refused to fairly analyze the evidence. This, however, is an insufficient basis to award attorneys' fees under Government Code § 800. The award of attorneys' fees under Government Code § 800 is allowed only if the actions of a public entity or official were wholly arbitrary or capricious. The phrase "arbitrary or capricious" encompasses conduct not supported by a fair or substantial reason, a stubborn insistence on following unauthorized conduct, or a bad faith legal dispute. Attorneys' fees may not be awarded simply because the administrative entity or official's action was erroneous, even if it was clearly erroneous. *American President Lines, Ltd. v. Zolin* (1995) 38 Cal.App.4th 910, 934. The decision whether or not to grant Silver Spur's Petition for a Discretionary Hardship was an intensely fact-based question involving days of evidentiary hearings and thousands of pages of documents. The decision ultimately was one to be made by the City within its sound discretion. Simply because the trial court has disagreed with the City does not render the City's conduct arbitrary or capricious. Finally, Silver Spur claims attorneys' fees under Government Code § 800 on the same grounds as those contained within its withdrawn Motion/OSC Re: Contempt. To award attorneys' fees under Government Code § 800 now would allow a backdoor contempt sanction, without requiring Silver Spur to prove the contempt elements, and after its OSC Re: Contempt was voluntarily withdrawn.

The trial court in this case considered and denied Silver Spur's Application for Attorneys' Fees under Government Code § 800. The decision of the trial court under Government Code § 800 is essentially one of fact within the sound discretion of the trial court. *Abshear v. Teachers' Retirement Board* (1991) 231 Cal.App.3d 1629, 1638; *Forrest v. Trustees of Cal State University & Colleges* (1984) 160 Cal.App.3d 357, 368. The trial court in this case did not abuse its discretion in refusing Silver Spur an award of fees under Government Code § 800. It is true that the City denied Silver Spur's Application for Discretionary Hardship Rent Increase and that the trial court found that the City's decision was incorrect. But the City did not act in bad faith. The City's decision was supported by substantial reason as set out in the hearing officer's lengthy findings and recommendations. The trial court did not abuse its discretion in denying Silver Spur attorneys' fees under Government Code § 800.

IV.

CONCLUSION

The Court should declare the 5% presumption in the City's Guideline to be valid. The Court should find that the City's Ordinance is constitutional to the extent it provides for rent control for all mobilehome spaces in Palm Desert, including spaces owned by second homeowners. The trial court's award of attorneys' fees to Silver Spur under Section 1988 should be reversed, and the trial court's denial of Silver Spur's Application for Attorneys' Fees under Government Code § 800 should be affirmed.

Dated: July 6, 2000

Respectfully submitted,

BEST BEST & KRIEGER LLP

By: /s/ Douglas S. Phillips
DOUGLAS S. PHILLIPS
Attorneys for Respondent and
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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Best Best & Krieger LLP, 74-760 Highway 111, Suite 200, Indian Wells, CA 92210. On July 6, 2000, I served: **THE APPELLANT AND RESPONDENT, CITY OF PALM DESERT'S COMBINED RESPONDENT'S AND APPELLANT'S REPLY BRIEF**

[X] by placing a copy of the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palm Desert, California by First Class Mail addressed as set forth below.

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on July 6, 2000, Indian Wells, California.

/s/ Karen Ciccarelli
Karen Ciccarelli

ATTORNEYS FOR Respondent City of Palm Desert

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

(Filed Oct. 27, 1997)

SILVER SPUR MOBILE MANOR, Petitioner, v. CITY OF PALM DESERT, Respondent.	Case No. 80790 RESPONDENT'S POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF MANDATE Trial Date: Nov. 14, 1997 Time: 8:30 a.m. Dept.: 2J Judge: Lawrence Fry

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Respondent City of Palm Desert responds to the petition for writ of mandate filed by petitioner, Silver Spur.

I.

STATEMENT OF FACTS

A. Introduction.

Petitioner is the owner of Silver Spur Mobile Manor, a mobile home park located in Palm Desert. Petitioner has filed this administrative mandate action to overrule the Palm Desert Rent Review Commission's decision denying petitioner's application for a discretionary hardship rent increase. Petitioner's application was first submitted to the City's Rent Review Commission, which referred it to a hearing officer who found that petitioner had failed to submit sufficient evidence to support the requested rent increase. Petitioner appealed to the City's Rent Review Commission. The Commission:

1. Accepted and confirmed the recommendation of the hearing officer; and

2. Adopted the hearing officer's findings and recommendations that:

a. there was insufficient evidence presented by the park owner to establish a deficiency in the net operating income that would require an increase in rent;

b. the application for the discretionary hardship increase was not frivolous;

c. the rental rates in the Silver Spur Mobile Home Park not be "rolled back" to the amount in existence prior to the 1988 agreement; and

d. each party be responsible for its own attorney's fees.

B. The Palm Desert Mobile Home Park Rent Review Ordinance Chapter 9.50 of the Palm Desert Municipal Code.

When petitioner filed the rent increase application on September 10, 1993, the Palm Desert Municipal Code Chapter 9.50 provided for Mobile Home Park Rent Review. (A.R. pp. 1-8) Chapter 9.50.040 establishes a Rent Review Board which receives, investigates, hears and determines petitions by landlords for "hardship adjustments" of rent. The Board may permit a rent increase if "denial of the request would result in undue hardship to the mobile home park owner's property."

1. Automatic Annual CPI Rent Increases.

Section 9.50.060 allows owner to annually increase rent in an amount equal to three-quarters (3/4) of the increase in the CPI. An owner that seeks to increase rent beyond this automatic "CPI" increase, must first obtain a "hardship rent adjustment" granted by the Rent Review Board.

2. Hardship Rent Adjustments.

Under Section 9.50.070, an owner or his representative may petition the Board for a hardship increase. The hardship petition is first considered and decided by a hearing officer appointed by the rent review board. The hearing officer's *proposed* findings and recommended decision become the *final* findings and decision of the rent review board within 15 days after they are filed with the City Clerk, without further action of the board, unless any party participating in the hearing files a petition to review the hearing officer's proposed findings and determination (9.50.070(o)). On appeal, the rent review board hears argument by the parties, considers the hearing officer's decision, the documentary evidence admitted in the evidentiary hearings and the petition for review (9.50.070(p)). At the conclusion of the hearing, the board either:

(1) Accepts and confirms the recommendations of the hearing officer; or

(2) Amends the findings and recommendations of the hearing officer; or

(3) Sends the matter back to the hearing officer for further hearings pursuant to any instructions provided by the rent review board.

Reconsideration of the Board decision may be requested because:

a. Newly discovered evidence is discovered which the requesting party was reasonably unable to present at the hearing; or

b. Fraud or impropriety committed by either a party, a member of the board or the hearing officer.

C. The Palm Desert Mobile Home Park Rent Review Board Guidelines for Hardship Rent Increases.

The Palm Desert Rent Review Commission, pursuant to 9.50.00(f), adopted "Guidelines" for hardship rent increases.

The guidelines are intended to permit rent levels that will provide landlords with a "fair return on their property" consistent with the Palm Desert Mobile Home Park Rent Ordinance, and the laws of the State of California. (Guideline Section 100). Section 100 presumes that the "Net Operating Income" (NOI) produced by a property during the base year (1982) provided a fair return on the property.

Guideline Section 101 allows landlords to seek two types of rent increases: 1) a *hardship* increase under Guideline 101(A); and 2) a *discretionary hardship* increase under 101(B).

A *hardship* increase under 101(A) permits rent increases such that the landlord's NOI in the base year is increased by 50% of the increase in the CPI over the base year.

Section 101(B), the *discretionary hardship*, allows a landlord to rebut the presumption that the automatic CPI increase, plus any 101(A) hardship increase provide a fair return on the landlord's property. The landlord may produce *any* evidence to rebut the presumption. Evidence that a landlord may present includes, but is not limited

to: 1) fair market value; 2) capitalization of income; 3) comparable sales; 4) replacement cost, and 5) original investment.

D. Silver Spur's Application for Discretionary Hardship Increase Under Guideline 101(B).

Silver Spur Mobile Manor is a 215-Space Mobile Home Park Located at 50-001 Highway 74 in Palm Desert, CA. It is owned by Silver Spur Reserve, which is a California general partnership ("Silver Spur"). Bruce Bedig is the managing partner of Silver Spur. In addition to the 215 mobile home spaces, Silver Spur Mobile Manor has 36 RV spaces for a total of 251 rental units.

On September 10, 1993, Silver Spur Reserve filed an application for discretionary hardship increase for Silver Spur Mobile Manor. (A.R. pp. 20-747.) The owner of Silver Spur applied for a discretionary hardship rent increase of at least $64.00 per space per month in order to provide the owner with a "fair return on their investment." (A.R. p. 22.) The application provides at p. 3:

> "A recent market rent survey indicates that fair market rents in the park should range from $369 to $489 per month, with an average rent of $414 per month . . . however, current rents are only $350 per month, or $64.00 below market . . . As a result, the park owners have been unable to receive a fair return on their investment in the property. The purpose of this application is to: 1) adjust the current rent to the fair market level; and 2) provide the homeowners with a fair return in their investment, as required by law."

The evidentiary hearing before the City hearing officer was first scheduled for December 10, 1993. (A.R. p. 876.) It was continued to Friday, January 14, 1994 (A.R. p. 877) then to Friday, February 4, 1994. (A.R. p. 878.) Both continuances were at the owner's request.

E. The Amended Application/Petition for Discretionary Hardship Rent Increase.

On February 2, 1994, the owner filed an *amended* application (A.R. p. 909) which: (1) Put capital improvements on a *cash* basis; (2) reduced the acquisition cost by $300,000; (3) added $29,300 to the acquisition cost; and (4) increased the rate of return sought by petitioner.

F. The Evidentiary Hearing.

1. Gerald Taylor Testimony.

Gerald Taylor, petitioner's first witness, is a real estate appraiser, consultant, investment analyst, and a former owner of a mobile home park. Mr. Taylor testified that he conducted a market rent survey on June 3, 1993, and determined that the average space rent was $414 and that the rental rates charged at Silver Spur were below average. On cross-examination, Mr. Taylor admitted that he had erred in his report, by listing features of the Park which did not exist. These included a card room, exercise room, lounge, basketball court, golf/putt green, playground, sauna, tennis courts and volleyball courts. Mr. Taylor compared the following parks to Silver Spur; Indian Springs, Suncrest Country Club, Palm Desert Mobile Estates, The Colony, The Canyon, Royal Palms,

Caliente Sands Mobile Country Club, De Anza Palm Springs, Desert Sands, El Dorado, Palm Springs View Estates, and The Wells, *Mr. Taylor also indicated that he had done an estimate of current market value of the Park in 1992 and determined that the Park was worth between $7,000,000 to $7,900,000.* On cross-examination Mr. Taylor stated that his fee for the market rent survey was $2,500, and that he had received $9,000 for doing a survey in 1991. He also admitted that most of his work is on behalf of park owners.

2. Bedig Testimony.

Mr. Bruce E. Bedig is the owner and managing general partner of Silver Spur Reserve, dba Silver Spur Mobile Manor. He is also a Certified Public Accountant. *He indicated that the partnership purchased the Park in 1977 for $2,000,000.* He identified the March 1988 Settlement Agreement between the residents and himself regarding rent increases for the next 5 years, and that this agreement expired on April 1, 1993. *He indicated that the property had been refinanced for $4,300,000 to provide the partners with funds to pay off personal loans and monies they had put into the Park. On cross-examination, Mr. Bedig admitted that up to 1988 the approximately $750,000 in improvements made to the Park were repaid by the residents pursuant to the Settlement Agreement.* He testified that the management fee paid is 6% of the gross income. Mr. Bedig testified that the management fee was justified because of the savings management had obtained from a waiver of sewer hook-up fees. (*Ordinance 456* Guidelines Section 102(c)(1)(a) creates a presumption that the management fees are reasonable if they are not in excess of 5% of gross income.)

Mr. Bedig stated that a fair rate of return is 11%, inflation-adjusted. Mr. Bedig stated that there were 2 vacant spaces in the Park. Mr. Bedig testified that the Net Operating Income for 1992 was $576,784.

3. Elias Testimony.

Richard Elias is the property manager for the Park. He is employed by Bessire & Kasenhiser, Inc.. He has been the off-site property manager for this Park since the spring of 1987.

He identified Homeowners' Exhibit #6 as being a rental statement from the Park. This statement indicates that there is pending a rent increase of $64.00 per space per month.

4. Dr. Fabrikant Testimony.

Dr. Fabrikant testified as to "fair rate of return" on behalf of the petitioner. Dr. Fabrikant submitted a 64-page report. He indicated that he has analyzed 3 mobile home parks besides Silver Spur. He testified the other parks were located in Fremont and Santa Cruz, and that he had not analyzed any other park in the Coachella Valley. Dr. Fabrikant stated that the "fair rate of return" is based in part on the "risk" involved with the investment. Generally, the standard to compare with is a Treasury note. There are different risks faced by the owner of a mobile home park. The first is the risk of having to continue to put money into the property. In addition, there are litigation risks in owning this type of property.

There is also a risk of vacancies. Furthermore, local market conditions are also a risk factor. If one uses the "opportunity cost method" one would look at Real Estate Investment Trusts (REIT) as an alternative to investing in a mobile home park. Real Estate Investment Trusts are traded on the stock exchange, therefore, they provide liquidity whereas a mobile home park is not a liquid asset. Also Real Estate Investment Trusts provide a lower risk as the portfolio is diversified between holdings in many properties. *Using the "opportunity cost perspective" the "fair rate of return" is between 11.8% to 14.1%.*

Dr. Fabrikant also calculated the "fair rate of return" using the "risk free rate" which involved adding to the rate of return for a risk free investment a risk premium. When he used this method, *he calculated the fair rate of return to be between 11.6% and 13.1%, for August 1993, with an average return of 12.9%.*

Dr. Fabrikant indicated that he did not consider the park owner's interest expense in making his calculations. *Further, he found no evidence that any of the $4,300,000 obtained in the refinancing of the Park went back into the Park.* His calculations were based upon figures given to him by others. He also indicated that he did not know whether the prices of the homes within the Park have dropped or increased.

Based upon his calculations Dr. Fabrikant indicated that the minimum rent increase required was $62.00 per space per month.

G. The Tenants' Opposition To The Petition.

1. Adams Testimony.

Several tenants, including Ken Adams, testified in opposition to the Petition. Ken Adams, a former Director of Finance for the City of Indio for 18 years and was City Controller for the City of Whittier for 14 years, graduated from the University of Southern California in Business Administration. He stated he examined the Initial Petition and the Amended Petition for the Discretionary Hardship Rent Increase. Mr. Adams testified that the Park owner had overstated capital improvements because Mr. Adams could not determine from the records whether the old assets had been removed and deducted from the additions to capital calculation. *If this was not done then it would overstate assets and understate return on investment. He felt that donated property should not be included in calculating the owner's investment, nor should the approximately $821,000 rental increase in the Settlement Agreement as those improvements were paid for by the residents.* Mr. Adams opined that the application provided insufficient documentation for establishing that "fair return." He felt that the amortization of debt service should be on the operating statement and it was not. He felt that the lack of a balance sheet in the application was a fatal flaw.[1]

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[1] The amended application and exhibits from the evidentiary hearing is found at A.R. pp. 1492-1730. Correspondence from the homeowners relative to the evidentiary hearing is found at A.R. pp. 1731-1795. The transcript of the evidentiary hearing is found at A.R. pp. 1796-2569. Supplemental documents from the homeowners relative to public utility issues are found at A.R. pp. 2570-2592.

H. Report and Recommendations of Hearing Officer.

On June 13, 1994, the hearing officer submitted his Report and Recommendations to the City. (A.R. pp. 2593-2617.) The hearing officer found that: (1) Insufficient evidence existed to overcome the presumption that owners were receiving a fair return on their investment; (2) Insufficient evidence established a deficiency in the Net Operating Income (NOI) that would require an increase in rent; (3) The application for discretionary hardship rent increase was not frivolous; 4) The rental rates in the park should not be rolled back to the amount in existence prior to the 1988 agreement; 5) Each party should be responsible for their attorney's fees.

On June 13, 1994, the City Clerk sent a copy of the hearing officer's findings and recommendations to the parties and their counsel. (A.R. pp. 2618-2621.)

I. Silver Spur's Petition for Review of Hearing Officer's Decision.

On June 28, 1994, the park owner petitioned for Rent Review Board review of the hearing officer's decision. (A.R. pp. 2622-2645.)

On October 24, 1994, the homeowners filed written opposition to the owner's petition. (A.R. pp. 2663-2685.) The appeal hearing was originally set for November 8, 1994, but (A.R. p. 2647) was postponed to December 2, 1994. (A.R. p. 2649.)

On December 2, 1994, the Board heard oral argument. (See Reporter's Transcript, A.R. pp. 2693-2773, condensed at A.R. pp. 2775-2789.) The Board adopted the hearing

officer's findings and recommendations without exception. Notice of the Board decision was issued by the City Clerk on December 2, 1994. (A.R. p. 2879.)

On December 30, 1994, owner requested reconsideration of the Board's December 2, 1994 decision. (A.R. pp. 2882-2911.) The homeowners filed a formal objection to the request for reconsideration. (A.R. p. 2912.) The deputy city attorney reviewed the request for reconsideration, to determine if the request contained new evidence. Staff recommended the request be denied because the requested contained *no* new evidence. The deputy city attorney agreed with City staff's recommendation that the reconsideration request be denied on this basis, (A.R. p. 2913), and advised the owner's attorney of this decision.

J. The Present Action.

On December 7, 1994, owner requested that the City prepare an Administrative Record of the entire proceedings. The Administrative Record was delivered to owner on March 30, 1995. petitioner/owner filed this action on February 24, 1995.

K. The November 15, 1996 Hearing.

At the first hearing before this Court on November 15, 1996, the Court advised that it could not locate the Administrative Record and remanded the matter to the Palm Desert Rent Control Board:

> "To provide more specific findings regarding the evidence the board relied on in calculating

> the park owners' investment in the property, the park owners' return on investment and the formula, if any, the board used in determining whether the park owners' rate of return was fair."

This order was filed February 20, 1997.

L. Proceedings by the Palm Desert Rent Review Hearing Officer and Commission on Remand.

The Palm Desert Rent Review Hearing Officer and Commission met on April 3, 1997, to discuss procedural issues (A.R. p. 2921-2965) and met again on Wednesday, April 9, 1997. At the April 9, 1997, meeting the Commission referred the matter to the Evidentiary Hearing Officer, Mr. Erwood, "for him to use his familiarity with the [Administrative] record to make more specific findings and bring back to the commission a vote 'Yea' or 'Nay'." (A.R. p. 2971.) The motion was carried unanimously. The hearing officer was ordered to submit his findings on May 6, 1997, so that the Rent Review Commission had an opportunity to review the report.

On May 6, 1997, the hearing officer filed his supplemental report (A.R. p. 2998-3005).

The Supplemental Report incorporates the original hearing officer's report (the original report is found at A.R. p. 2593-2617). The Supplemental Report, in addition to incorporating the previously submitted report, the Supplemental Report makes findings with respect to management fees, the payment by the residents in excess

of $800,000 in increased rent to pay for capital improvements, and finally, the Supplemental Report examines Dr. Fabrikant's report. The Supplemental Report concludes:

> "The petitioner has failed to satisfy the burden of proof by a preponderance of the evidence that the rental rates do not provide for a fair rate of return."

The Supplemental Report bases this opinion on the following *additional* factors not mentioned in the original report:

(1) The park charges management fees in excess of what is considered reasonable by the ordinance;

(2) The overwhelming weight of the evidence supports the finding that the residents paid $800,000 plus in increased rents to pay for capital improvements to the property that the park owner has claimed as his own; and

(3) An examination of Dr. Fabrikant's report shows that the returns to this park are in line with what has historically been the experience of this park as an investment vehicle both before and after rent control. (A.R. p. 3004.)

On May 15, 1997, the Palm Desert Rent Review Commission reviewed and approved the hearing officer's recommendation. The Minutes of the May 15, 1997 Palm Desert Rent Review Commission meeting are found at AR pages 3008-3038.

M. This Notice of Motion and Motion for a Writ of Administrative Mandamus.

On September 25, 1997, the Owner filed its second motion for writ of administrative mandamus and supporting authorities. The City now files its opposition to this motion.

II.

AUTHORITIES AND ARGUMENT

A. Overview.

Regulation of the rent charged for mobile home spaces is within the police power. (See California Constitution Article XI, Section 7.) Low vacancy rates in rental housing units, monopolies, or other market imbalances leading to tenant exploitation and excessive rents have precipitated such regulation. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 160; *Carson Mobile Home Park Owners Association v. City of Carson* (1983) 35 Cal.3d 184, 187 fn. 7.) Reported cases have expressly upheld protection of tenants from excessive rents and protection of tenant welfare. (*Pennell v. City of San Jose* (1988) 485 U.S. 1, 11-12. *Birkenfeld v. City of Berkeley*, cited above, 17 Cal.3d 159-160.) Various formulae or methods for granting rent increases have been upheld as facially valid because they are reasonably related to providing a "just and reasonable return", do not preclude a just and reasonable return, or necessitate unconstitutional results. A just and reasonable return has been described as: "one which is high enough to encourage management, reward efficiency and discourage the flight of capital and is commensurate with

returns on comparable investments, but not so high as to defeat the purpose of preventing excessive rents." There is a *range* of rents which can be characterized as providing a just and reasonable return. (*San Marcos Mobile Home Park Association v. City of San Marcos* (1987) 192 Cal.App.3d 1492, 1502.) Rent control agencies are not obligated by either the state or federal constitutions to fix rents by application of any particular method or formula. (*Carson Mobile Home Park Owners Association v. City of Carson,* cited above, 35 Cal.3d at 191.) An ordinance may presume that a landlord's net operating income in the base year produced a fair return on investment, and allow rent increases in order to maintain that net operating income. (*Oceanside Mobile Home Park Owners Association v. City of Oceanside* (1984) 157 Cal.App.3d 887.)

Palm Desert employs the net operating income (NOI) approach. In addition to annual, automatic CPI adjustments, mobile home park owners in Palm Desert may apply for two types of individual hardship increases (hardship under Guideline 101(A) and discretionary hardship under 101(B)) pursuant to a methodology found in the Palm Desert Municipal Code and the Guidelines.

In *Carson,* cited above, the ordinance listed various nonspecific and unqualified factors that could be considered in determining fair return including the consumer price index, federal wage and price guidelines, rents for comparable mobile home spaces, length of time since the last rent increase, capital improvements, changes in property taxes, and reasonable operating and maintenance expenses. *Under such standards, the agency weighs all factors in accordance with its perception of what might be reasonable.* The Supreme Court rejected arguments that the ordinance

was unconstitutionally vague. (See *Carson*, cited above, p. 188, fn. 2.) Of course, on application, rent control boards must avoid confiscatory results. (*Kirkpatrick v. City of Oceanside* (1991) 232 Cal.App.3d 267.)

B. Standard of Review With Respect to Palm Desert Municipal Code Section 9.50 and the Palm Desert Rent Review Commission Guidelines.

Generally, a statute or local ordinance will be presumed to be constitutional unless the unconstitutionality clearly, positively and unmistakenly appears. (*Oceanside Mobile Home Park Owners Association v. City of Oceanside* (1984) 157 Cal.App.3d 887, 897; *Hale v. Morgan* (1978) 22 Cal.3d 388, 404.) Rent control legislation will be held to be valid as a proper exercise of the police power so long as it is "reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property." (*Birkenfeld v. City of Berkeley*, cited above, 17 Cal.3d 165.) Facial validity is more concerned with excessive restriction than with comprehensiveness of regulation. Only drastic ordinances which are so restrictive as to facially preclude any possibility of a just and reasonable return can be struck down as facially confiscatory. (*Cotati Alliance for Better Housing v. City of Cotati* (1983) 148 Cal.App.3d 280, 291.)

The language used in a rent control rule or regulation which has a plain and ordinary meaning may be disregarded *only* when it would inevitably result in absurd consequences or frustrate a manifest purpose of the legislature as a whole. This rule has been expressly held

applicable to a rent control commission regulation approved by legislative body to implement a rent control ordinance. (*Indian Springs, Ltd. v. Palm Desert Rent Review Board* (1987) 193 Cal.App.3d 127, 134.)

C. The Substantial Evidence Standard of Review Applies to Decisions of the Rent Control Board.

The substantial evidence standard is proper when reviewing the decision of a rent control board. (*San Marcos Mobile Home Park Owners Association v. City of San Marcos* (1987) 192 Cal.App.3d 1492, 1500.) The court must review the administrative record to determine whether the agency's decision was supported by substantial evidence. (*San Marcos Mobile Home Park Owners Association v. City of San Marcos,* cited above at 1504; *Patterson v. Central Coast Regional Commission* (1967) 58 Cal.App.3d 833, 842.)

Great judicial deference to administrative discretion is required of the court. This is statutorily expressed in Code of Civil Procedure Section 1094.5(f) which provides in part that the judgment shall not limit or control in any way the discretion legally vested in the respondent. The general rule is one of deference to determinations of the law by administrative agencies. (*Yee v. Mobile Home Park Rental Review Board* (1993) 17 Cal.App.4th 1097, 1106 fn. 6.) *Given the deference accorded fact finders by appellate courts, the reviewing court should merely determine whether the decision was within a range of permissible results and is therefore not subject to further review.* (*Yee v. Mobile Home Park Rental Review Board,* cited above at 1109.)

D. The Substantial Evidence Rule As Applied To This Case.

Petitioner seeks a "discretionary hardship" increase in rent on the ground that their current rent does not provide a fair rate of return under Palm Desert Rent Review Guideline Sections 100 and 101(B). The applicable standard of review is *whether there is substantial evidence that the rental rates provided a fair rate of return on the park owner's equity investment.* (*Westwinds Mobile Home Park v. Mobile Home Park Rental Review Board (City of Escondido)* (1994) 30 Cal.App.4th 84, 90, 91.)

E. The Historic Cost Approach For Determining Fair Rate Of Return Is The Most Generous Measure To Petitioner.

The first step in the analysis is determining the owner's rate of return. The hearing officer in this case (without explicitly saying so) applied the *historic cost* approach to measure the owner's rate of return at Silver Spur.

Under the *historic cost* approach:

A. The owner's net investment is computed by: 1) adding *acquisition cost*[2] to; 2) capital improvements, and deducting; 3) accumulated depreciation. (*Westwinds Mobile Home Park,* cited above, 30 Cal.App.4th 91, 92; *Yee v. Mobile Home Park Rental Review Board* (1993) 17

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[2] The cost of acquisition or purchase price is the proper factor, *not* the current *fair market value* of the property. (*Palomar Mobile Home Park Assn. v. Mobile Home Rent Review Commission* (1993) 16 Cal.App.4th 481, 485.)

Cal.App.4th 1097, 1104 footnote 5; *Palomar Mobile Home Park Assn. v. Mobile Home Rent Review Commission* (1993) 16 Cal.App.4th 481, 487, 488.);

B. The next step is to determine "operating profit." This is calculated by adding the annual profit/loss to the *interest expense.* (*Westwinds*, cited above, *Yee*, cited above, *Palomar Mobile Home Park Assn. v. Mobile Home Rent Review Commission*, cited above, 16 Cal.App.4th at p. 487.) (Emphasis added.)[3];

C. The final step is to divide the operating profit (B) by the owner's net investment (A) which, in turn, yields a rate of return expressed in percentages. *This according to Westwinds, cited above is the most generous measure applicable to this type of case.* (*See, Westwinds*, cited above, at 30 Cal.App.4th, p.92.)

F. Fair Rate of Return.

Once the "historic cost" calculations produce a rate of return, the next question is whether substantial evidence exists that the rate of return is fair. What is fair

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[3] In *Yee v. Mobile Home Park Rental Review Board* (1993) 17 Cal.App.4th 1097 the court stated: "The historic cost standard treats the actual cost of the property including that represented by encumbrances (equivalent of book value) as the investment and the net operating income *with no deduction for interest paid on encumbering debt as the 'return'. The 'return on equity' standard, where it is based on cost rather than value . . . treats equity cost rather than total cost as the investment and the net operating income after deduction of interest on encumbering as the 'return'. . . . Because of the distinction and the manner in which interest on encumbering debt is triggered in the two formulations, they ordinarily will reach roughly similar results if the rate of return on comparable investments is similar to the interest rate on the encumbering debt."*

depends on what like investments (ones involving similar risks, with similar capital appreciation and tax benefits to the owner) produced. (*See, Westwinds,* cited above, at 30 Cal.App.4th at p. 92, *Yee,* cited above, at 17 Cal.App.4th at pp. 1109-1110.) In *Westwinds,* the court held that a return of 2.78% was below the rate ordinarily acceptable to a prudent investor. (*Westwinds,* cited above, at p. 92.) In *Yee,* the court held that a return of 4.2% was insufficient. But in *Palomar,* the court apparently accepted 6% and 7.8% as fair rates of return. In *Yee,* the Board "assumed" that a 10% return was appropriate.

G. The Historic Cost Approach Applied To Silver Spur.

The *historic cost* factors gleaned from the Silver Spur, discretionary hardship application are:

Acquisition Cost:	**$2,029,300.00[4]**
Accumulated Depreciation:	**- $ 705,718.00[5]**
Capital Improvements:	**+ $1,136,682.00[6]**
Owner's Net Investment (Acquisition Cost + Capital Improvements – Accumulated Depreciation) =	**$2,460,264.00.[7]**

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[4] See A.R. p. 927 (April 6, 1977 Purchase Agreement, ¶1(A)). See A.R. p. 910 and 948 ($29,300.00 in additional costs). The total purchase price of the property was thus $2,029,300.00.

[5] See A.R. p. 952. (Buildings and improvements: $571,123.00; Furniture, fixture and equipment: $134,595.00; for a total depreciation of $705,718.00.)

[6] A.R. p. 915 and 916, and Exhibits 10-26 of the Petition for Rent Increase.

[7] Tenants argued that some of the "capital improvements" were not improvements at all. For example, see: A.R. p. 948 –

Petitioner's 1992 income was $78,614.00 and petitioner's 1992 interest expense was $498,170.00 for a total operating profit of $576,784.00.

Petitioner's rate of return ($576,784.00 + $2,460,264.00) was 23.4%, under the historic cost formula.

H. Is The Rate Of Return Fair?

Petitioner's consultant, Dr. Fabrikant, opined that a rate of 10.74% was required to provide a fair return for this investment. When the historic cost formula is applied, Silver Spur's return of 23.4% is *more than twice* the return determined to be fair by petitioner's own expert.

1979 (new pad expansion area, water and electrical systems and sewer system); A.R. p. 949 (mobile home for management use and utility pick-up truck); (step-up basis adjustment arising from acquisition by remaining partners of interest of retiring partners); A.R. p. 950 (step-up basis adjustment); A.R. p. 951 (purchase of new manager's coach); A.R. p. 952 (professional fees, step-up basis adjustment, copier, golf cart, plumbing upgrades on coach and sale of land). The exclusion of these items reduces capital improvements by $881,503.00 to $255,179.00. *This yields a rate of return of 36%.* ($2,029,300 - $700,500,718 + $255,179,000 = $1,578,761.00. $570,764.00 + 1,578,761.00 = 36%).

I. The Hearing Officer And The Rent Review Commission Had The Discretion Not To Deduct Debt Service for the $4,300,000 Refinance Loan From Income.

Guideline Section 102(c)(2)(b) states:

> "Operating expenses shall not include: . . . mortgage, principal and interest payments."

The California Supreme Court permits a City not to deduct debt service from income, in order to determine operating profit *so long as the entire purchase price was included in the original acquisition cost figure.*[8] (*Fisher v. City of Berkeley* (1984) 37 Cal.3D 644, 691-692.) In *Fisher*, the court expressly approved Berkeley's two "antispeculation clauses" which explicitly excluded *increased* debt service as a deduction from income. The *Fisher* court stated that such an exclusion was permissible where a "safety value" in the ordinance (or in this case, the rules and regulations) allows a landlord to obtain a fair return on his investment. This "safety value" is found in the Palm Desert Guidelines at Sections 101(B) and 103. This treatment of debt service was also approved in *Oceanside Mobile Home Park Owners Association v. City of Oceanside* (1984) 157 Cal.App.3d 887, 895. In that case, the formula under consideration did not deduct debt service from income. Also, the Fourth District Court of Appeal, Division Two, has considered guideline 102(c)(2)(b) which excludes debt service, and allowed that guideline to stand. *Natter v. Palm Desert Rent Review Commission* (1987)

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[8] That is what was done here: The $2,000,000 + acquisition cost *includes* the cash paid and the part financed.

190 Cal.App.3d 994, 998. Finally, the Fourth District Court of Appeal, Division One, in *Palomar Mobile Home Park Association v. Mobile Home Rent Review Commission* (1993) 16 Cal.App.4th 481, at 488, held that debt service should not be included in the calculation. The court stated:

> "Moreover, Palomar's version of the 'historic cost' formula means that an owner's fair return will vary depending on the financing arrangements. Assume two identical parks, both purchased at the same time for 1 million dollars each. Park A is purchased for cash; Park B is heavily financed. Under Palomar's approach, calculating return based on his total historic cost and treating interest payments as typical business expenses would mean that Park A would show a considerably higher operating income than Park B. Assuming a constant rate of return, the owners of Park B would be entitled to charge higher rents than the owners of Park A. *We see no reason why this should be the case.*"

See also *Apartment Association v. Santa Monica Rent Control Board* (1994) 24 Cal.App.4th 1730, 1736 which addresses Santa Monica's rent control regulations. The court in *Apartment Association* noted without adverse comment that Santa Monica regulation 4101 disallows deduction of mortgage principal and interest payments from income in making the fair return calculation.

The contrary dictum in *Kavanau v. Santa Monica Rent Control Board* (1993) 19 Cal.App.4th 730, 733, fn. 3 has no precedent. It conflicts with the *Fisher* decision and is contrary to *Oceanside*, *Natter* and *Palomar*. It should not be followed by this Court.

When petitioner refinanced the Silver Spur Mobile Home Park, the owner put $4.2 million in his pocket. None of these funds went back into the park. The debt service incurred by the owner for this refinancing should not be passed onto the tenants in the form of a rent increase.

J. Neither (1) The Petitioner's Acquisition Cost nor (2) The Owner's Capital Improvement Cost Should Be Increased To Account For Inflation.

The Board did not adjust the Petitioner's acquisition cost or capital improvement cost for inflation. Petitioner argues that the *Acquisition Cost must* be increased from just over $2 million to over $5 million to account for inflation, under *Cotati Alliance for Better Housing v. City of Cotati* (1983) 148 Cal.App.3d 280. Not so. *Cotati* says that the Board *may* "equate the original investment with current dollar values and assure a fair return accordingly." (*Cotati* at 148 Cal.App.3d p. 289.) Thus, *Cotati* permits, but does not mandate, an adjustment for inflation.

In addition, petitioner seeks to adjust its *capital improvement* expenditures amounting to $1,136,682.00 to just over $1.8 million, again for the impact of inflation. There is no authority for this.

There are three additional reasons not to adjust for inflation in this case. First, an inflation adjustment is not a component of the "historic cost" method of determining fair return.

Second, to increase the original purchase price for inflation would, in essence, *permit a return based on the current fair market value of the property rather than on the*

cost of acquisition.[9] *Both the United States and California Supreme Courts have ruled that a fair return on value standard is not constitutionally mandated, and that a fair return on investment approach is acceptable,* even if it results in lower revenues than a value-based standard. (*Palomar Mobile Home Park Assn.*, cited above, at 16 Cal.App.4th p. 485 *Yee* cited above, at 16 C.A.4th 487; *Duquesne Light Company v. Barasych* (1989) 488 U.S. 299; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 686.)

Third, the record reflects that petitioner has *already gotten* annual CPI rent increases based on inflation. After its acquisition in 1977, the park owner imposed a series of annual rental increases on the tenants as follows:

1977 – $13.00 per space, per month;

1978 – $15.00 per space, per month;

1979 – $25.00 per space, per month;

1980 – $17.00 per space, per month;

1981 – $15.00 per space, per month;

1982 – $15.00 per space, per month;

1985 – $3.00 per space, per month;

1986 – $17.00 per space, per month;

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[9] The "inflation adjusted" acquisition cost of $5,058,992.00 (A.R. p. 914), plus the "cumulative inflation adjusted capital improvements" of $1,800,797.00 (A.R. p. 916) totals $6,859,789.00. Petitioner's appraisal expert, Gerald Taylor, testified that the Park had a current value of somewhere between 7.0 million and 7.9 million. (A.R. p. 1846, line 15). "Cost" very nearly equals "value" under petitioner's approach.

The five-year Settlement Agreement (A.R. pp. 957-965) between Silver Spur and the Homeowners, dated March 2, 1988, allowed yearly rent increases equaling 75% of the change in the CPI. The CPI increases through the period 1987 to 1992 were 4.3%, 4.6%, 5.1%, 5.1% and 4.0%. In addition to the CPI increases, the agreement granted the owner an increase of $60.00 per space per month over a period from 1988 through 1992. (See A.R. pp. 957, 959 and 960.)

K. A Rent Increase Should Not Be Compelled Because Rents Are Higher At Some Other Mobile Home Parks.

Petitioner cites a market survey and argues that Silver Spur rents must be increased because other parks charge more rent.

Rent rate information from other parks, by itself, is not as a useful guide to determine whether petitioner is receiving a fair return on *its* investment. Higher rents in other parks might be due to higher purchase prices paid for those parks, park amenities, capital improvements, and the terms of any agreements between park owner and tenants.

The historic cost formula does not consider, as a factor, the amounts charged in other parks. The only possible relevance of rents charged in other parks would be as a guide to what a *fair* return on investment in a mobile home park should be. Dr. Fabrikant, petitioner's expert witness, has opined on this issue. His opinion was considered by the hearing officer and the Board.

Even if the market survey information is considered as a factor, as *permitted* by *Vega v. City of West Hollywood* (1990) 223 C.A.3d 1342, a rent increase is not *mandated*.[10] The market survey information is not a basis for this Court to *overrule* the decision of the hearing officer and the Palm Desert Rent Review Board.

L. Supplemental Report of the Hearing Officer.

The hearing officer's Supplemental Report incorporates the previously submitted report and, in addition, makes three additional findings putting the hearing officer's recommendation that the discretionary hardship increase be denied. Those factors are:

(1) The park owner collects a management fee which exceeds the amount presumed reasonable by the Palm Desert Rent Control ordinance;

(2) The park owner pursuant to a settlement agreement charged $800,000 in rent and made additional improvements to the streets and sewers which the park owner has claimed as his own; and

(3) A finding that the park owner's expert report (the Fabrikant report) reflects that returns to the park are in line with what has historically been the experience of the park as an investment vehicle both *before* and *after* rent control.

None of the factors contained in the hearing officer's original report and none of the factors contained in the

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[10] Nor is a rent *decrease* mandated. Petitioner's survey shows that some parks charged *lower* rent than Silver Spur!

hearing officer's supplemental report should be considered in a vacuum. Taken together, all of the factors mentioned in the hearing officer's report contain the findings which support the hearing officer's recommendation that the discretionary hardship increase be denied.

The Rent Review Commission adopted the hearing officer's findings contained in his original and supplemental reports and found that the owner failed to satisfy their burden of proof by a preponderance of evidence that the rental rates at the park do not provide for a fair rate of return.

The hearing officer properly made the additional findings contained in his supplemental report (indeed that was the directive from the Superior Court). The Commission properly relied upon and adopted those findings in determining that the application for a discretionary hardship increase be denied.

M. Petitioner's Argument That Palm Desert Municipal Code Chapter 9.50 Is Not Supported By Adequate Findings Is Barred By the Doctrine of Exhaustion of Administrative Remedies. Even if the argument is not barred, The City of Palm Desert Has Made Findings In Support Of Palm Desert Municipal Code Chapter 9.50 (Mobile Home Park Rent Review).

Before bring a lawsuit, the challenging person must first exhaust all administrative remedies by raising at each stage of the City's administrative process all the legal and/or factual issues that will ultimately be raised in court. (*Sea & Sage Aud[u]bon Society, Inc. v. Planning*

Commission (1983) 34 Cal.3d 412.) Exhaustion of administrative remedies is not a matter of judicial discretion; it is jurisdictional. (*Grant v. Superior Court* (1978) 80 Cal.App.3d 606.) The present action is brought to overturn the administrative decision of an administrative body: a rent review board, and the exhaustion doctrine applies. (*City of Coachella v. Riverside County Airport Land Use Commission* (1989) 210 Cal.App.3d 1277.) The Fourth District has treated the exhaustion doctrine as applicable to rent control proceedings. (*Kirkpatrick v. City of Oceanside* (1991) 232 Cal.App.3d 267, 277-279.) Petitioner never argued that the Palm Desert Municipal Code was unconstitutional for lack of findings, either before the hearing officer or the Rent Review Board. Petitioner has failed to exhaust its available administrative remedies by failing to raise the issue during the administrative hearings before the City, and petitioner is precluded from raising the issue now. But even if petitioner is not precluded from raising the issue, petitioner's argument must fail.

AR pages 1 through 8 contain a copy of Palm Desert Municipal Code Chapter 9.50. Each section of Chapter 9.50 refers to Palm Desert Ordinance 456. Ordinance 456 added Chapter 9.50 to the Code of the City of Palm Desert relating to Mobile Home Park Rent Review. The Palm Desert City Council adopted Ordinance 456 on March 27, 1986. Ordinance 456 was codified at Chapter 9.50 Palm Desert Municipal Code.

Ordinance 456 contains five findings paragraphs which state the purposes of Ordinance 456 and Palm Desert Municipal Code Chapter 9.50. The first finding states that a shortage of mobile home park space exists in the City. On October 16, 1996, the City filed a certified

copy of Ordinance 456, attached to the Declaration of Sheila Gilligan, City Clerk. Ordinance 456 was also attached to Respondent's brief filed August 15, 1996 as Exhibit "A". Respondent requests that the court take judicial notice of Ordinance 456 pursuant to Evidence Code §452(b).

N. The Palm Desert Rent Control Ordinance Property Applies To All Mobile Home Park Residents In The City, Whether They Are Second Home Owners Or Not.

Petitioner contends that rent controls must be lifted for all second homes at the park. Petitioner cites absolutely no authority for this proposition. There is none. Exclusion of second family residents from mobile home park rent control raises grave equal protection concerns. Regardless of who owns those spaces, the City of Palm Desert has found that mobile home park spaces are in short supply and that unless rent controls are imposed, park owners may impose excessive rents.

Absolutely no authority exists for the proposition that rent control may or may not apply depending on who owns the space. The decision should not be struck down because some of the tenants are second homeowners.

III.

CONCLUSION

This Court should not compel the Board to grant Silver Spur a discretionary hardship rent increase because

rents at other parks are higher, or due to inflation, or as a result of the owner's 4.2 million dollar refinance. Petitioner is receiving an ample return on its investment (over 23%), which is almost twice the rate petitioner's expert, Dr. Fabrikant, opined was fair.

The purpose of rent control is to permit an efficient landlord to pay all actual and reasonable expenses and to receive a fair profit while, at the same time, protecting the public interest in having affordable and properly maintained rental housing. The decision of the Board furthers these purposes. The petition should be denied, and the May 15, 1997 decision of the Palm Desert Rent Control Board should be affirmed.

Dated: October 27, 1997

BEST BEST & KRIEGER LLP

By: /s/ Douglas S. Phillips
DOUGLAS S. PHILLIPS
Deputy City Attorney for
the City of Palm Desert

PROOF OF SERVICE BY MAIL
[CCP § 1013a(3)]

STATE OF CALIFORNIA)
)
COUNTY OF RIVERSIDE)

I am employed in the County of Riverside, State of California. I am over the age of 18 and not a party to the

within action; my business address is 39700 Bob Hope Drive, Suite 312, Rancho Mirage, California 92270.

On October 27, 1997, I served the following document described as **RESPONDENT'S POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF MANDATE** on the parties in this action:

[ ] By placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list;

[ ] By telefaxing a true copy thereof to the party and telefax number below;

[X] By placing [ ] the original [X] a true copy thereof enclosed in sealed envelopes addressed as follows, and send by UPS

UPS
Kurt Delsack, Esq.
3334 E. Coast Highway, Suite 316
Corona Del Mar, CA 92625

UPS
Anthony C. Rodriguez, Esq.
1300 Clay Street, Suite 600
Oakland, CA 94612

[ ] I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Rancho Mirage, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **October 27, 1997**, at Rancho Mirage, California.

/s/ Rita Sikorski
Rita Sikorski

CLOSING PAGE

This Appendix is provided in support of the Respondents' Brief in Opposition.

Respectfully submitted,

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